IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

FRIDAY, THE 13TH APRIL 2007 / 23RD CHAITHRA 1929

Ins.APP.No. 12 of 2005(A)

ICA.3/2003 of ESI COURT, PALAKKAD
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APPELLANT/RESPONDENT

E.S.I. CORPORATION,
PANCHADEEP BHAVAN, ROUND NORTH,
THRISSUR-20.

BY ADV. SRI.T.V.AJAYAKUMAR

RESPONDENTS: APELLANT

R. RAMAKRISHNAN,
AJI NIVAS, AVANAVU ROAD,
PERMAMANGALAM POST, THRISSUR.

BY ADV. SRI.P.RAMAKRISHNAN

THIS INSURANCE APPEALS HAVING BEEN FINALLY HEARD ON 13/04/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

'C.R'

K.HEMA, J.

Insurance Appeal. No.12 of 2005

Dated this the 13th April, 2007

JUDGMENT

Can the Medical Board constituted under the Act (`the Statutory Board', for short) determine, as a `disablement question', as to what was the `employment injury' caused to an insured employee in the relevant accident, on a reference under section 54A of the Employees State Insurance Act (`the Act for short)? Can the Employees Insurance Court (`Insurance Court', for short) determine by itself, disputed questions relating to `employment injury' and `permanent disablement' caused to the employee ? Is there any difference between `employment injury' and `permanent disablement'? Is the Statutory Board, the sole authority which can determine `employment injury' and `permanent disablement' of an insured employee ? Can the Insurance Court refer the employee to any medical board other than the Statutory Board for assessing `permanent disablement' ? These are the main questions which arise for consideration in this case.

FACTS BRIEFLY:

2. The respondent herein was a watchman in a cotton mill. He is an employee as defined under the Act. On the crucial night, while he was on duty, he accidentally fell down from the stair case and sustained certain injuries. He was removed to the hospital and thereafter, referred from hospital to hospital. He was also referred by the Corporation to the Statutory Board, to assess the disability, if any. On the first reference, a provisional assessment of 6% loss of earning capacity was made, as per Exhibit B6. On a second reference, it was reported that the `earning capacity was reduced to 2% on a permanent basis'.

FIRST ROUND OF LITIGATION:

3. The decision on the second reference was challenged by the employee in an appeal filed before the Insurance Court. The court found that the claim made by respondent is unsustainable, since the loss of earning capacity is not affected, as the employee was continuing in service and was receiving the monthly salary with periodical enhancements. The court also held that if respondent had lost employment or there is reduction in his salary, on account of the disability, he would be at liberty to approach the Corporation for a fresh reference to the Statutory Board, in which case, the Board will determine the quantum of disability, with reference to the

loss of earning capacity. The said decision was challenged before this court in an appeal filed by employee. This court upheld the decision of the Insurance Court in ***Ramakrishnan v. ESI Corporation*** (2000(2) KLT 538) and dismissed the appeal. It was also held that employee was not entitled to any benefit, since he was getting salary and he continued in employment.

SECOND ROUND:

4. The employee, thereafter, retired from service on medical ground, since he was alleged to be totally incapacitated as a result of the injury. He also got his case again referred to the Statutory Board, in the light of the decision of the Insurance Court and as permitted by the court. The Statutory Board, on examination of the injured, found that `IVDP' (Intra vertebral disc prolapse) which allegedly led to the disablement was unlikely due to `employment injury'. As per Exhibits B11 and B12, the Board reported that disability of respondent is `NIL' (vide Exhibit B11).

5. The above decision of the Board was challenged by the employee before the Insurance court. According to him, he is entitled to the benefit of total permanent disablement, i.e., 100% permanent disability, since he is forced to confine to the bed because of the employment injury. He is alleged to be totally incapacitated to do any kind of job which was capable of

performing at the time of accident. The respondent was out of employment also, due to the employment injury. The employee got himself examined by the Medical Board constituted by the District Medical Officer and also the Medical Board for the Physically Handicapped, at Medical College Hospital, Thrissur. Certificates issued by the above Boards were also marked as Exhibit A74 and Exhibit A90. As per ExhibitA90, the employee has `moderate disability of 60%'. The employee claimed 100% disablement and to support the claim, he placed reliance upon mainly, the above certificates.

6. The Corporation filed a detailed written statement and denied the entitlement of the respondent to get any disablement benefit under any count. It was contended that no reliance can be placed on Exhibit A74 and Exhibit A90, since those are not issued by the Board constituted as per the provisions of the statute. According to Corporation, the Board constituted under the Act alone can determine the `disablement question' and hence, the claim made by respondent based on Exhibit A74 and Exhibit A90 is to be rejected.

EVIDENCE AND FINDINGS:

7. Witnesses were examined on both sides. Documents were also marked. The evidence in this case consists of oral testimony of AW1 and Exhibits A1 to A99 on the respondent's side. The

Corporation-appellant did not let in any oral evidence, but marked Exhibits B1 to B13 Insurance Court found that the present ailment of the employee-respondent, including `IVDP' was directly connected with the `employment injury' sustained by him on 15.12.1987. The Insurance Court set aside the decisions of the Statutory Board to the effect, "`IVDP' is very unlikely due to the employment injury" which was reported as per Exhibits B11 and B12.

8. The Insurance court acted upon Exhibit A74 and Exhibit A90 certificates issued by Medical Boards other than the Statutory Boards, certifying 60% disability, and it was held that respondent is entitled to get `disablement benefit' for 60% of loss of earning capacity, with effect from 28.9.1999 ie., from the very next day on which the employee voluntarily retired from service due to his disability. The court, however, found that respondent cannot claim disablement benefit for the period during which he was in employment and when he earned wages, in the light of the findings of this Court in the earlier appeal. It was also found that he was on loss of pay from 1.7.1997 to 27.9.1999, as per Exhibit A98 certificate issued by the employer and that he was relieved from duty on medical grounds under voluntary retirement scheme with effect from 27.9.1999. Hence, the Corporation was directed to consider the eligibility for sickness benefit or disablement benefit for the period

from 1.7.1997 to 27.9.1999, if no such benefit was given to him for that period.

CHALLENGE BY CORPORATION:

9. The above order and the findings of the Insurance Court are challenged in this appeal by the Corporation. Learned counsel appearing for Corporation-appellant strongly contended that as per the reports of the Statutory Board, respondent did not suffer `IVDP' but, he had only "sprain right ankle joint", which is reported to be, "simple" by the doctors. Hence, respondent did not have 'IVDP' or any permanent disability, as a result of the accident and respondent is not entitled to get any benefit under the Act. As per Exhibit B11 report issued by the Statutory Board, the nature of incapacity of respondent which resulted from the accident is only "sprain right leg" which gave rise only to a claim for temporary benefit. It was also contended that as per Exhibit B12, the Statutory Board formed an unanimous opinion that "`IVDP', with all the treatment records available is very unlikely due to the employment injury" and the court which is not technically equipped to assess the disputed fact cannot over-rule the said decision of the Statutory Board.

10. The respondent on the other hand would contend that the injury which was caused in the relevant accident is `IVDP' and he is totally incapacitated by `IVDP' which is caused as a result of the

accident and hence he is entitled to 100% benefit.

NATURE OF INJURY, THE CORE ISSUE:

11. From the contentions raised by both sides, I find that the crucial issue in this case is, the nature of injury sustained in the accident. In other words, the disputed question to be resolved is whether the `employment injury' caused by the accident is only a "sprain on the right ankle joint" or whether it is `IVDP'. No doubt, burden is upon the employee to prove that he sustained a particular injury in the relevant accident. If he is claiming any permanent disablement benefit, he has further to prove that he sustained an `employment injury' which led to the alleged disablement.

12. The fact that respondent sustained an `employment injury' is not under dispute. To prove the nature of employment injury caused to respondent, he examined himself as AW1 and produced various medical records. He deposed in court that he sustained `IVDP' in the accident and that he was hospitalised for the said problem. Exhibit A1 is a document issued from the E.S.I. Hospital, as early as on 14.1.1988 ie., within one month from the date of alleged accident. It is specifically stated therein that there was a history of fall and the diagnosis was "IVDP with sciatica".

13. Exhibit A2 is yet another medical certificate from the ESI

dispensary, Ponkunnam. As per date seal, it is issued on 27.12.1987 ie., on the 12th day of the accident (the accident was on 15.12.1987). It was issued to the Ortho Surgeon, District Hospital, Thrissur. It is stated therein that the patient fell down in a pit and fractured his right leg and injured his low back. The said document also reveals that the patient complained of severe low back pain and he had been treated. The patient was also referred to the District Hospital for expert management as per Exhibit A2.

14. Exhibit A42 is another certificate issued by the Insurance Medical Officer at E.S.I. dispensary, Ponkunnam, referring respondent with `IVDP' etc. It is also certified thereby that he is eligible for all E.S.I. benefits. This letter was issued to the Superintendent, E.S.I. Hospital. Though no date is seen in the letter, on overleaf, a date is mentioned as 6.5.1996 by the Superintendent, E.S.I. Hospital, Olalikara. A discharge summary issued from the Apollo Hospital, Madras is marked as Exhibit B52 and as per this document, the date of admission in the spinal surgery unit is on 4.8.1997 and the history shows that the patient fell down in a pit and fractured his right leg and injured his low back. He had also complaints of pain in low back, radiating to left lower limb, since past 3 to 4 years. It also shows that he has undergone a surgery. Several other medical records from various other hospitals

have also referred to 'IVDP' as a complaint, following the accident.

15. The genuineness of these documents is not under dispute. There is also no reason to doubt the authenticity of any of the documents produced by the respondent, most of which were all issued from the E.S.I. Dispensary itself. There is no case for the Corporation that those documents are fabricated for the purpose of this case. The documents which are issued as early as within 12 days of the injury reveal that the respondent had `IVDP', consequent to the accident. There is no reason to reject the facts disclosed by the relevant documents. The Corporation was not able to establish that those are false or unacceptable due to any reason.

16. There is nothing in evidence to show that respondent developed `IVDP' at the the early stage of 38 years of age, due to any reason other than the accident. (The petitioner is stated to be aged 38 years, as on 27.12.1987, as per the medical record. The Corporation did not specifically challenge respondent's age). If at all the respondent sustained `IVDP' due to some other reason, there would be some evidence or indications to infer that, but there is absolutely nothing on record to reveal that `IVDP' occurred due to any other reason than the accident. On going through the documents and evidence of respondent, it can be easily concluded that respondent developed `IVDP' with sciatica, consequent to the fall on

15.12.1987, as noted by the doctors attached to the E.S.I dispensary itself.

17. In this connection, it is also pertinent to go through the pleadings in the written statement also. As per the pleadings in the written statement, the employee-respondent was paid extended sickness benefit for 730 days amounting to Rs.62,000/- for `IVDP' during 1997-99. It is also stated therein that the Government of Kerala had also sanctioned Rs.50,000/- for corrective surgery of spine at Cochin Spine Hospital. If `IVDP' is not an employment injury, there was absolutely no justification for the Corporation to grant any benefit for `IVDP', as stated in the written statement. That apart, it is pertinent to note that the Statutory Board itself had treated the 'employment injury' as 'IVDP' and the extent of loss of earning capacity, on account of the above problem was assessed on different dates at 6% and 2%. The later decision was challenged before the Insurance Court and this Court also, but the Corporation had no case at that time that respondent did not have 'IVDP' as an 'employment injury'.

18.Taking all these facts into consideration, I find that respondent has succeeded in proving that the `employment injury' caused to him in the relevant accident is `IVDP'. The unanimous opinion of the Board in Exhibit B11 and ExhibitB12 that the injury is

only “sprain right ankle joint” and that “`IVDP' with all the treatment records available is very unlikely due to the ”employment injury” cannot be accepted, especially since the treatment records reveal facts to the contrary. Any medical expert or even a lay-man who has occasion to go through the medical records, cannot ignore the facts disclosed from them that the patient had `IVDP' as a consequence of the accident. From the tell-tale medical records and the evidence of AW1 the respondent, it is clear that `IVDP' was caused, as a result of the relevant accident and it is an `employment injury'. The Insurance Court has therefore, rightly held that such an opinion cannot be expressed on the basis of the medical records and treatment given to the respondent.

19. But, learned counsel for appellant raised a serious question of law that once Statutory Board determines the disputed question and gives a report on a scientific matter, the court cannot over-rule the decision of the Board, as per law. It was also argued that the Statutory Board is the sole authority which can determine the disputed question under the provisions of the Act and hence legally, the report of the Board cannot be rejected. I shall now proceed to consider the merit of this contention.

IS STATUTORY BOARD, THE SOLE AUTHORITY TO DECIDE THE DISPUTED QUESTION ?

20. As already held by me, the core issue in this case is the dispute relating to nature of 'employment injury'. The Statutory Board unanimously opined that 'IVDP' is very unlikely due to 'employment injury'. According to the Board, 'employment injury' is only “sprain”. Can this court over-rule the above decision ? Is the Statutory Board the sole authority which can determine the nature of 'employment injury' under the Act ?

21. To resolve this issue, a reading of sections 54, 54A and 2(8) of the Act is absolutely essential. Section 54A reads as follows:

> “Section 54-A: References to medical boards and appeals to medical appeal tribunals and Employees’ Insurance Courts -(1) The case of any insured person for permanent disablement benefit shall be referred by the Corporation to a medical board for determination of the disablement question and if, on that or any subsequent reference, the extent of loss of earning capacity of the insured person is provisionally assessed, it shall again be so referred to the medical board not later than the end of the period taken into account by the provisional assessment.
>
> (2) If the insured person or the Corporation is not satisfied with the decision of the medical board, the insured person or the Corporation may appeal in the prescribed manner and within the prescribed time to-
>
> (*i*) the medical appeal tribunal constituted in accordance with the provisions of the regulations with a further right of appeal in the prescribed manner and within the prescribed time to the Employees’ Insurance Court, or

(*ii*) the Employees' Insurance Court directly: provided that no appeal by an insured person shall lie under this sub-section if such person has applied for commutation of disablement benefit on the basis of the decision of the medical board and received the commuted value of such benefit:

Provided further that no appeal by the Corporation shall lie under this sub-section if the Corporation paid the commuted value of the disablement benefit on the basis of the decision of the medical board".

22. A reading of section 54A of the Act reveals that the case of any insured person for `permanent disablement benefit' shall be referred by the Corporation to the Statutory Board for determination of the `disablement question', the extent of loss of earning capacity etc. But, what is a `disablement question' ? It is dealt with under section 54 of the Act. Section 54 of the Act is extracted as hereunder:

"Section 54. Determination of question of disablement.—Any question—

(*a*) whether the relevant accident has resulted in permanent disablement; or

(*b*) whether the extent of loss of earning capacity can be assessed provisionally or finally; or

(c) whether the assessment of the proportion of the loss of earning capacity is provisional or final; or

(*d*) in the case of provisional assessment, as to the period for which such assessment shall hold good;

> shall be determined by a medical board constituted in accordance with the provisions of the regulations and any such question shall hereinafter be referred to as the “disablement question”.

23. It is clear from a reading of sections 54 and 54A of the Act that `disablement questions' which can be determined by the Statutory Board on reference of the case, as per the provisions of the Act are only such questions which are specified in clauses (a) to (d) of section 54 of the Act and nothing more. As per clause (a) of section 54 of the Act, the Board can determine whether the relevant accident resulted in `permanent disablement' or not. In other words, it can determine whether the employee suffered any disability of a permanent nature, as a result of the accident.

24. But, it is pertinent to note and emphasise here that in none of the sub-clauses of section 54 of the Act, it is specifically laid down that the Statutory Board can determine what was the 'employment injury' caused in the accident. Therefore, the Statutory Board cannot determine, as a `disablement question' under section 54 of the Act, as to what was the `employment injury' caused in the accident. Though Statutory Board may have to ascertain as to what exactly was the 'employment injury' caused in the accident, for determining the 'disablement question' under section 54(a) of the Act

(ie., whether the accident resulted in any permanent disablement or not), the said provision does not specifically lay down that the Statutory Board can determine as a 'disablement question', what the employment injury is. What can be determined by Statutory Board under section 54(a) of the Act is not as to what the `employment injury' is, but it is whether the relevant accident resulted in `permanent disablement' or not.

25. The question relating to nature of `employment injury' or the existence of a particular employment injury, strictly speaking, is thus not a `disablement question' coming under section 54 of the Act. But, what can be determined as a 'disablement question' under Section 54(a) of the Act is whether the accident resulted in any 'permanent disablement'. Hence, it cannot be said that the Statutory Board is the sole competent authority which can determine the disputed question arising in this case relating to the nature of 'employment injury', as a 'disablement question', under the Act.

26. It is also pertinent to note at this juncture that the Insurance Court permitted a reference not for determination of 'employment injury' but it is to decide quantum of disability, extent of loss of earning capacity etc. Hence, the Statutory Board ought not to have decided nature of the 'employment injury' on a reference under Section 54A of the Act. The nature of injury sustained in the relevant

accident had been decided by the Statutory Board as 'IVDP' on earlier references and the Corporation had not challenged the said decision. On the other hand, in the earlier proceedings before courts, the Corporation did not dispute nature of 'employment injury'. Taking all these facts into consideration, I find that the Statutory Board ought not to have decided the nature of 'employment injury', which it cannot determine as a disablement question.

`EMPLOYMENT INJURY' & `PERMANENT DISABLEMENT':

27. But there cannot be any dispute that the Statutory Board can determine whether the accident resulted in any 'permanent disablement'. So, another interesting question arises now. What is the difference between 'permanent disablement' and “employment injury”? Apparently, it may appear that there is no much difference between the two. But a close look at the relevant expressions will reveal that there is evidently a difference. “Employment injury” is defined under section 2(8) of the Act as follows:

> “Employment injury” means a personal injury to an employee caused by accident or an occupational disease arising out of and in the course of his employment, being an insurable employment, whether the accident occurs or the occupational disease is contracted within or outside the territorial limits of India;

28. What is permanent total disablement ? It is defined under Section 2(15-B) of the Act, as follows:

> “Section 2(15-B):“permanent total disablement” means such disablement of a permanent nature as incapacitates an employee for all work which he was capable of performing at the time of the accident resulting in such disablement;
>
> Provided that permanent total disablement shall be deemed to result from every injury specified in Part I of the Second Schedule or from any combination of injuries specified in Part II thereof where the aggregate percentage of the loss of earning capacity, as specified in the said Part II against those injuries, amounts to one hundred per cent or more;”

29. A reading of section 2(8) of the Act reveals that `employment injury' is a `**personal injury**' to an employee caused by accident etc., but, it has no specific reference to the `**disablement**' caused in the accident. `Injury' means, harm done to a person’s body, for example, in an accident (vide The Concise Oxford Dictionary). “Disablement” is not defined under the Act, but going by the dictionary, it means the state of being disabled or the process of becoming disabled to do any particular act which a person was able to perform, prior to the accident. 'Disable' means, `to injure or affect somebody permanently so that, for example, they cannot walk or cannot use a part of their body'. (vide The Concise Oxford Dictionary).

30. Thus, while injury is the harm caused to the body of a person, `disablement' is the consequence or affect of such

injury/harm on the person because of which, he is unable to use a part of the body permanently. `Disablement' is not the **'nature of injury'** caused in the accident but, it is the '**consequence of the injury'.** An injury caused in an accident may be an abrasion, contusion, laceration, fracture or the like. It may be simple or major. But such injury may or may not lead to any disablement, in all cases. What the Statutory Board can determine on reference under section 54A read with section 54 of the Act is not whether the employee sustained any such particular injury in the accident, but whether the `employment injury' caused in the accident led to any `permanent disablement' or not.

31. In other words, the Statutory Board can determine whether the 'employment injury' rendered the employee unfit to use any part of his body and it incapacitated him to do all the work which he was capable of performing prior to the accident etc. Thus, going strictly by the language of sections 54(a) and 54A of the Act, the Statutory Board, on reference under section 54A of the Act, can determine under section 54(a) of the Act, the effect or consequence of the `employment injury' on the employee (ie., whether the relevant accident resulted in `permanent disablement') and not as to what the injury was or its nature was. Therefore, the nature of `employment injury' caused to the employee in the relevant accident

is not a `disablement question' which the Statutory Board can determine under any of the clauses in section 54 of the Act and hence it cannot be said that the Statutory Board is the sole authority which can determine the disputed question in this case.

`EMPLOYMENT INJURY' CAN BE DETERMINED BY COURT:

32. The nature of `employment injury' can be determined by the court itself on the basis of evidence as may be adduced in the case, even independent of the report of the Board. What was the injury sustained in the accident will be disclosed from the medical records, documents etc., prepared at the time of examination of the injured, and during his treatment, following the accident.

33. The direct evidence of the employee coupled with the medical records and evidence relating to the nature of injury caused in the accident may suffice to take a decision on the relevant fact. In fact, the Statutory Board will not be in the picture at all at that time. Therefore, decision on this question may only be an opinion evidence relating to the `employment injury' which will be based on existing medical records relating to examination and treatment etc. of the employee by other experts.

34. Any way, the court can enter a finding of its own, regarding the nature of 'employment injury' from the evidence relating to the same, including the documents relating to the examination, treatment

etc., given to the injured, following the accident. The court may also rely upon any other acceptable materials available on record to determine the nature of `employment injury'. The Court may also refer the employee to any other medical expert or board also to take a right decision in the matter. In cases of dispute, however, the court can by itself determine what the 'employment injury' is, just like any other disputed fact arising in the case.

BOARD'S DECISION ON 'PERMANENT DISABLEMENT'

35. However, it cannot be doubted that the Statutory Board can, under section 54(a) of the Act, determine whether the relevant accident resulted in `permanent disablement'. But the Statutory Board reported that permanent disability caused to the employee in this case is `nil'. So, the next question that arises for consideration is, can the court over-rule the said decision of the Statutory Board since, it is a decision on 'disablement question'. Is the court bound to act upon the decision of the Board on 'permanent disablement', as argued by learned counsel for appellant ?

36. It is true that the Statutory Board reported that permanent disability in this case is, `nil'. But, this opinion is expressed on the basis of a wrong conclusion arrived at by the Board that the `employment injury' is only “sprain”. I have already held that the Board committed a mistake in concluding that the `employment

injury' is only “sprain” and not `IVDP', despite the overwhelming medical evidence available that the employee sustained `IVDP', as a result of the accident. The Statutory Board failed to consider the most material injury which was caused to the employee while reporting that permanent disability is `nil'. In such circumstances, the opinion expressed by the Board on `permanent disablement' being founded on a wrong conclusion on the nature of `employment injury' which led to 'permanent disablement' is erroneous and it cannot be accepted.

37. According to me, nothing bars the court in arriving at such conclusion. The court can certainly enter a finding on the correctness of the decision of the Statutory Board, when there are sufficient materials on record to show that the Board's decision is wrong. It will be meaningless to say that the court, under no circumstances, can set aside the decision of the Statutory Board, especially when it is challenged in court.

38. Learned counsel for appellant placed reliance upon the dictum laid down in the decision of a Division Bench of this Court in ***E.S.I Corporation v. Pushkaran*** **(1993 (2) KLT 187)** to argue that the court cannot interfere wth the decision of the Statutory Board. The relevant portion from the said decision can be extracted below:

> “Here the employee is challenging the decision of the Medical Board. The burden of establishing that the

> finding of the Medical Board was not proper is on the employee. There is very little scope for the court which is not technically equipped to assess the quantum of disablement or to interfere with the finding of the Medical Board on grounds which are not established before it or on compassionate grounds which cannot be tested by superior court".

39.On a reading of the above judgment also, I find that an interference with the decision of the Statutory Board, on the basis of sufficient materials on record may not be illegal. What is held in the above decision is that there is very little scope for the court which is not technically equipped to assess the 'quantum of disablement'. I have not assessed the quantum of disablement in this case. But, I have so far only found that the Board's decision on 'employment injury' can be interfered with by the court, because it is established by other evidence and circumstances that the said decision is wrong. There is no blanket ban in interfering with or setting aside the Board's decision even on the question of 'permanent disablement', if there are materials to do so.

40. The decision of the Board in this case is totally contrary to other medical records available in this case on the very existence of a particular injury on the employee. It is also against the earlier reports of the Board. In such circumstances, the court can certainly set aside the Board's decision in this case, in the light of evidence available on record, admissions made in the written statement,

relating to existence of `IVDP' and also, certain other circumstances such as granting of benefit to the employee, taking into account `IVDP' as the disablement as per earlier reports of the Statutory Board itself etc. Any way, on going through Pushkaran's case, I find that nothing therein to indicate that the Insurance Court is not at all empowered to decide nature of `employment injury', or interfere with the decision on 'permanent disablement' if there are legally acceptable materials to do so. In such circumstances, Pushkaran's case will not come to the rescue of the Corporation. I am not persuaded to holdl that court cannot under any circumstance interfere with decision of Statutory Board, even on 'disablement question'.

BUT WHAT IS THE EXTENT OF 'PERMANENT DISABLEMENT' ?:

41. Exhibits A74 and A90 are the certificates produced by the employee to prove that he has `permanent disablement' of 60%. The Insurance Court found that loss of earning capacity is 60%. Learned counsel appearing for appellant vehemently contended that the court below ought not to have relied upon Exhibits A74 and A90 to arrive at a conclusion that `permanent disability' is 60%. But, learned counsel appearing for the respondent on the other side would contend that Exhibit A74 is a document which is issued by none other than a Medical Board constituted by a District Medical Officer

and Exhibit A10 is also issued by the Medical Board at the Medical College Hospital, Thrissur, which are independent Medical Boards at the Government Institutions and hence there is nothing wrong in placing reliance upon these documents.

42. But, on going through the evidence and records I find that the argument advanced by learned counsel for appellant on this issue can only be accepted for the following reasons: Exhibits A74 and A90 are certificates issued by the Medical Board constituted by the District Medical Officer and the Medical Board for the Physically Handicapped, at Medical College Hospital, Thrissur respectively. But, those are only xerox copies of the reports. None of the makers of the documents were examined and the documents are not proved legally, even though those are disputed. Even if Exhibits A74 and A90 are genuine documents, in the absence of legal proof, those cannot be relied upon to enter any finding in favour of the respondent, especially regarding the percentage of disability.

43. Further, Exhibit A74 shows that the respondent was examined on 12.7.1999 and the Board opined that respondent is unable to continue his profession and that he has a "partial permanent disability of 60% for life". Exhibit A90 which is the report issued subsequently from the Medical College Hospital, Thrissur. ExhibitA90 shows that the employee was examined on

30.10.2002 and he is having a "moderate disability of 60%". While in Exhibit A74, the disability is described as "partial permanent disability", it is reported in Exhibit A90 that it is "moderate disability". The latest report is Exhibit A90, as per which the disability is "moderate". It may not be proper to infer that "moderate disability" is the same as "permanent disability", especially in the absence of medical evidence or any materials to reveal that both are one and the same. What is meant by `moderate disability' is not clear from evidence. It is a medical term and it needs clarification, before the court is called upon to act upon the same. In the absence of it, it may not be legal or proper to conclude that what is reported as per Exhibit A90 is the percentage of `permanent disablement', especially since there is nothing in evidence to show that `moderate disability' and `permanent disablement' are same.

44. The respondent claimed `total permanent disability'. But, it may appear from Exhibit A74 which is produced by the respondent himself that he has only `partial permanent disability'. There is no satisfactory evidence before the court to come to a conclusion that subsequently, respondent suffered total or 100% permanent disability, as alleged. In such circumstances, though the competency of the Boards which issued Exhibit A74 and ExhibitA90 to furnish opinion on the relevant question cannot be disputed. Still, it

is difficult to make a positive conclusion on the basis of such documents as to what was the exact nature of the disability, its extent etc.

45. Needless to say, the nature of disability (whether it is total permanent disability or partial permanent disability, the extent of such disability etc) is fact which has be proved by expert evidence. The court will have to decide the issue based on medical evidence, since it is on a point of science. When the Court has to form an opinion upon any point of science, the opinion upon that point of persons specially skilled in such science are relevant facts and such fact can be proved by evidence of such experts under section 45 of the Evidence Act. Without there being expert evidence on these aspects, it may not be proper for the court to decide whether extent of loss of earning capacity is provisional or final; and if it is provisional, as to the period for which such assessment shall hold good, whether the employee suffered permanent disability and if so, what is the extent of such disability etc. But there is no acceptable expert evidence on the relevant fact before the court to enter a finding on the extent of and nature of the disablement which is relevant in this case.

IS BOARD'S REPORT NECESSARY TO DECIDE “PERMANENT DISABLEMENT”?

46. Learned counsel for appellant strenuously argued that the court cannot enter a finding on the question of 'permanent disablement', except on the basis of the report of the Statutory Board. If Statutory Board expresses an opinion, it cannot be overlooked by the court, it was contended. The Statutory Board having formed an unanimous opinion that the disability is `nil', the court which is not technically equipped cannot enter a finding to the contrary, it was strenuously urged.

47. I shall now proceed to consider the merit of the contentions raised. A reading of section 75 of the Act will be necessary, in this context. Section 75 lays down the matters which can be decided by Employees' Insurance Court. The relevant portion of the said provision reads as follows:

> "S.75. Matters to be decided by Employees' Insurance Court.— (1) xxxx
>
> (2) xxxxx
>
> (2-A) If in any proceedings before the Employees' Insurance Court a disablement question arises and the decision of a medical board or a medical appeal tribunal has not been obtained on the same and the decision of such question is necessary for the determination of the claim or question before the Employees' Insurance Court, that Court shall direct the Corporation to have the question decided by this Act and shall thereafter proceed with the determination of the claim or question before it in accordance with the decision of the medical board or the

> medical appeal tribunal, as the case may be, except where an appeal has been filed before the Employees' Insurance Court under sub-section (2) of Section 54-A in which case the Employees' Insurance Court may itself determine all the issues arising before it.
>
> (2-B) xxxx
>
> (3) xxxxxx"

48. Sub-section 2-A of section 75(1) of the Act lays down that in cases where an appeal has been filed before the Employees' Insurance Court under sub-section (2) of Section 54-A challenging the decision of the Statutory Board, the Employees' Insurance Court may by itself determine all the issues arising before it, which may include a `disablement question'. That means, if the decision of the Board is already available and it is under challenge before the Insurance Court, may itself determine all the issues arising before it. This will evidently include a decision of the statutory Board on a 'disablement question' under Section 54(a) of the Act i.e., whether the relevant accident resulted in 'permanent disablement' or not. So, when the report of the Statutory Board is challenged with respect to its decision on 'permanent disablement', which is a 'disablement question' falling under Section 54(a) of the Act, the Insurance Court will be entitled to determine such 'disablement question' by itself, by virtue of sub-Section (2A) of Section 75(1) of the Act. In such circumstances, the argument advanced by learned counsel for

appellant that once the Statutory Board determines a 'disablement question', the court is bound to act upon the same etc. cannot be sustained.

49. Section 75(1)(2-A) of the Act also lays down that if in any proceedings before the Employees' Insurance Court, a `disablement question' arises and the decision of a medical board or a medical appeal tribunal has not been obtained on the same, and the decision of such question is necessary for the determination of the claim or question before the Employees' Insurance Court, that Court shall direct the Corporation to have the question decided by this Act. In such cases, the `disablement question' is to be determined by the Statutory Board, as stated in section 54 of the Act and the Corporation shall take steps to get it answered. Thereafter, the court shall proceed with the determination of the claim or question before it, in accordance with the decision of the Board or the medical appeal tribunal, as the case may be.

50. It therefore, follows that a reference to the Statutory Board may be necessary as per Section 75(1)(2-A) read with Section 54A of the Act in cases where the decision of a medical board or a medical appeal tribunal has not been obtained on the disablement question. But if an appeal has been filed before the Employees' Insurance Court under sub-section (2) of Section 54-A of the Act challenging the

decision of the Statutory Board, such reference to the Statutory Board may not be necessary and the court may by itself determine the issue, as clear from section 75(1)(2-A) of the Act itself. Thus, on a close reading of the relevant provisions, it will be abundantly clear that it is only in cases where the decision of the statutory medical board or medical appeal tribunal is unavailable and the decision of such question is necessary for the determination of the claim or question before the Employees' Insurance Court, the court need obtain such decision from the statutory Board and determine the issue, in accordance with such decision.

51. But, in cases where the decision of the Board is already obtained by the Corporation on the `disablement question' and it is under challenge under section 54A(2), the insurance Court may determine the `disablement question' by itself by virtue of section 75 (1)(2-A). It follows that in cases where the decision of the Board is challenged before the court in an appeal before the Employees' Insurance Court under sub-section (2) of Section 54-A, the Insurance Court is not bound to act upon the decision of the Board. The court may, by itself, decide all the issues including a dispute on 'disablement question' arising before it, independently. The court can take a decision on the basis of the evidence and materials already available on record which may include report of the Statutory Board

or opinion of any expert other than the Board, to determine whether the Statutory Board's decision is correct or not and also to enter a finding on the issue relating to any `disablement question' etc.

52. It is only reasonable to hold that in cases where the Board's decision is found to be unacceptable by the Insurance Court, the court will, necessarily, have to rely upon other materials which the court finds to be satisfactory and acceptable to arrive at a finding on the relevant issue. When the question involves a scientific issue, the court may seek evidence of the experts, opinion or their reports, for taking a decision on such issue. If the court finds that an opinion from any expert is necessary to take a right decision on the disputed issue, it may obtain the same and decide the question, accordingly. Any way, section 75(1)(2-A) empowers the Insurance Court to independently determine the `disability question' and all other issues by itself and for that purpose, it may rely upon any such evidence and materials which are available on record. The court may also rely upon evidence or opinion of any other medical expert or Medical Board than the Statutory Board, if the latter report is found unsatisfactory and unacceptable.

53. But, it cannot be validly contended that in cases where the decision of the Statutory Board on the disputed `disablement question', is challenged in appeal before the Insurance Court, the

court is bound to take a decision only in accordance with the decision of the Statutory Board. If such a view is taken, there is no meaning in filing an appeal against the Board's decision. It cannot also be said that the Statutory Board is the sole authority which can determine the `disablement question', once its decision is challenged before the Insurance Court. Since section 75(1)(2-A) of the Act provides that the court may by itself determine the `disablement question', it can do so, independent of the decision of the Statutory Board. But, the question being one involving scientific matter, the court may require the opinion of medical experts to take a decision on the question of `permanent disablement', the court not being an expert to assess the nature or extent of disability. Though the court can by itself determine all the issues as stated in section 75(1)(2-A) of the Act, the court which is not technically equipped to assess the quantum of disablement, would certainly require aid of evidence of medical expert to decide the issue on the nature and extent of disablement.

54. The court may rely upon the medical evidence if any, adduced by the employee or any other acceptable materials available in court to take a decision on the issue, if the court finds that the report of the Statutory Board is unacceptable. It may also refer the employee to any expert or any Board other than the Statutory Board, if the court deems it necessary to get a report on

the relevant issue, for taking a right decision in the case. So, in this case, having found that the decision of the Statutory Board cannot be accepted and the medical reports produced by the respondent are not legally proved, and clarifications are required on certain aspects, in the interest of justice, the court will have to give an opportunity to the parties to adduce further evidence on the relevant issue. It may also refer the employee, if found necessary, to any other medical expert or board, as it may deem fit and proper, for assessing the relevant fact, if such a request is made. The order passed by the Insurance Court regarding loss of earning capacity, in the absence of evidence on a scientific issue, cannot therefore, be sustained. The impugned order relating to `permanent disablement' is therefore to be set aside and the matter requires a reconsideration. The case has to be remanded for fresh consideration and disposal in accordance with law, in the light of the observations made in this judgment.

55. However, I would mention in this context that to decide the nature of the disability and the disputed disability question, there is no point in referring the employee to the Statutory Board once again. Such reference, if any, may give rise to a fresh cause of action to either of the parties to challenge such decision. Therefore, I find that the best course open will be to allow employee an opportunity to prove the certificates already produced by him by examining the

expert or experts or to allow him to taken steps for being referred to any competent medical expert or board other than the statutory Board, for examination and a report on the relevant `disablement questions', the extent of loss of earning capacity etc., which he seeks to prove for getting the benefit. The Insurance Court may allow the Corporation also to adduce such evidence as it may deem fit to allow, in support of its contentions relating to the above facts.

56. Any way, the order passed by the court below, directing appellant to give permanent disablement benefit for 60% permanent disability, based on Exhibit A74 and Exhibit A90 cannot be sustained. On a consideration of the facts and circumstances of the case, I find that an opportunity is to be afforded to both sides to contest the case on the disputed questions on permanent disablement, as discussed above.

RES JUDICATA ?

57. Learned counsel appearing for the appellant raised another important argument that the present proceedings are hit by res judicata. It was contended that the appellant cannot re-agitate the issue which is finally disposed by this court, as per judgment in M.F.A.No.1154 of 1992 (vide Ramakrishnan vs. ESI Corporation). It was also submitted that respondent had earlier challenged the decision of the Medical Board constituted under the Act, which

assessed permanent disability at 2% as per Exhibit B7, but the said appeal was dismissed by Insurance Court, and it was confirmed by this Court in M.F.A.No.1154 of 1992. Therefore, the earlier decision of the Statutory Board finding that the disability is only 2% has become final and respondent cannot now contend that he has total permanent disability.

58. It was, however, pointed out by learned counsel for respondent that in the judgment of this court referred above, (vide Exhibit A76) it was held that the Insurance Court had "by way of abundant caution had observed that on account of the disability, if the appellant has lost employment or there is reduction in his salary, he will have the liberty to approach the Corporation for a fresh reference to the Medical Board in which case, it is incumbent on the part of the Medical Board to determine the quantum of disability with reference to the loss of earning capacity". Thus, this court did not interfere with the decision of the Insurance Court to allow the employee to have a further reference under a particular circumstance.

59. Therefore, learned counsel for the respondent would contend that the court having given liberty to respondent to get a subsequent reference done at his request on losing his employment, he only availed of this opportunity of a second

reference, when he lost his employment, as he allegedly became totally incapacitated due to the injury. It was in such reference that the present decisions were taken by the Statutory Board, as per Exhibits B11 and B12, which were challenged by the employee. Therefore, it cannot be said that the present proceedings are barred by res judicata, it was argued.

60. On a perusal of the records in this case, especially the judgment of this Court in MFA No.1154 of 1992 and the order of the Insurance Court in the earlier proceedings, it is clear that the assessment made as per Exhibit B7 by the Board, as per which extent of loss of earning capacity is 2%, is not treated as a final one. On the other hand, both the courts gave liberty to respondent, evidently, to raise `disablement question' once again, by a reference to the Statutory Board. Therefore, the decision taken by the Board as per Exhibit B7 can be treated only as a `provisional' one and not final. It is clear from the language of the provision contained in Section 54A of the Act itself that there can be more than one reference under certain circumstances, for determining `disablement questions' etc.

61. It is relevant to note that In this case itself, there were three references by the Corporation. The decision on the first reference is covered by Exhibit B6. The decision on the second

reference is as per Exhibit B7. Admittedly, a third reference was also made by the Corporation itself, though it was at the instance of the respondent. So, having made a reference, as permitted by the court, the decisions taken as per Exhibits B11 and B12 can be said to be only decisions in the third reference with permission of the Court. Such references are only legal, in the light of the provision contained in Section 54A of the Act itself. Repeated references are contemplated, as per section 54 A of the Act and the report on such references, will depend upon subsequent events.

62. In such circumstances, the earlier decision of the court on quantum of permanent disablement cannot be said to be final. The decision as per Exhibit B11 and Exhibit B12 has given rise to a fresh cause of action and hence the present proceedings are barred by res judicata. The last reference was made to determine the alleged total permanent disability, the extent of loss of earning capacity etc., on a subsequent event taking place, when the employee lost his job. The assessment and determination of the questions which are relevant under section 54A of the Act on the last reference depends upon lapse of time, the improvement or deterioration of the physical condition of the respondent, if any, after sustaining employment injury. Even if the entire arguments of learned counsel for appellant-Corporation are accepted, it will be relevant to note that the reported

percentage of `permanent disability' has reduced from 2% to 'nil' as per the reports of the Board and this itself would indicate that there was a change in the condition. That apart, in the earlier proceedings which, according to the Corporation, has become final, the Board accepted the `employment injury' as `IVDP' and considered it as a permanent disability also, and assessed the quantum of disablement, accordingly. Taking all these facts into consideration, I find that the present proceedings are not hit by res judicata.

VOLUNTARY RETIREMENT:

63. Learned counsel for appellant also contended that the respondent has gone in for voluntary retirement, as evidenced by Exhibit A98 and since he lost his employment voluntarily, he cannot claim any benefit under the provisions of the Act. It is only if the loss of employment is consequent to `employment injury' that he can claim the benefit, it is argued. Learned counsel for the respondent however, contended that it may not be correct to say that respondent had voluntarily retired but the retirement was consequent to the disablement suffered due to the `employment injury'. It was submitted that he was given an offer to retire voluntarily, taking into account his inability to continue in any job.

63A. According to respondent, he opted for voluntary retirement, under compelling circumstances. He was referred to

various hospitals, including Sree Chithira Hospital, Thiruvananthapuram, Apollo Hospital, Madras etc. for expert management. He also undertook treatment from various Ayurveda Hospitals. The respondent is even now undergoing treatment. These are all borne out by medical records. The respondent's case is that he is totally incapacitated to continue his employment and hence he had no other option than to quit his employment. The respondent having undergone treatment in the different system of medicines without any break, ever since he sustained employment injury, he had to be on continuous leave on medical grounds and that too, without wages, it is contended.

64. The respondent had thus, allegedly suffered loss of earning and a request was also made by him for light job, during day shift in the factory, but that was also turned down by the Company on the ground that there was no vacancy. The Company also stopped periodical payments and disablement benefits to respondent, after his last examination by the Medical Board on 12.7.1997. The respondent also did not get any permanent disability benefit, in accordance with the decision as per Exhibit B7, taken by the Medical Board on 23.6.1989. The respondent had to remain on leave for long period and his services were not terminated due to the sole alleged reason that he had to be on leave as advised by the

E.S.I. doctors.

65. In such circumstances, respondent allegedly found it more beneficial to resign from the Company on 27.9.1999 on medical ground under voluntary retirement scheme. The respondent made representations for a review of his case, since he became totally disabled. He was forced to take up his grievance with the Headquarters of the appellant as well as Union Labour Minister and other authorities. Finally, appellant directed respondent to appear for examination before the Medical Board. The respondent again appeared before the Medical Board on 11.1.2001. But the Medical Board allegedly refused to examine him on the plea that they had not received any instruction from the benefit section of the appellant-corporation to examine the respondent. He again took up the matter, and he was directed to appear before the Medical Board on 8.2.2001.

66.The members of the Board were allegedly adopting a negative approach, though the respondent promptly appeared before them and they refused to examine him on a different plea that they were not specifically instructed to assess the disability arising out of `IVDP' suffered by him. The respondent again made representation to the Minister concerned and finally the appellant-corporation directed the respondent to appear for examination on

16.5.2001. The members of the Board were highly antagonized towards the respondents, it is pleaded. Since he had taken up the matter with the higher authority, they neither examined him nor did they go through the records available with him. They told him that no further examination was necessary, since they were aware of his case.

67. According to respondent, appellant-corporation did not inform the respondent about the decision of the Medical Board for a long time. The respondent was at last informed through his wife that the Medical Board had not recommended for any disability. The respondent allegedly approached various authorities like Human Rights Commission etc., and finally the appellant sent a communication on 25.7.2002 stating that the disability was assessed as `nil', though the respondent was totally incapacitated to any kind of job which was capable of performing at the time of accident. He is forced to confine to bed, it is contended. The respondent was also out of employment on account of the employment injury he sustained.

68.In the meanwhile, the Company management allegedly offered a voluntary retirement scheme. According to respondent, this fact will be clear from Exhibit A68. The said document is referred to as a resignation letter. It is given by respondent to the

management. A close perusal of the said lettter shows that it refers to an offer made by the employer for retirement under voluntary retirement scheme. The respondent has also mentioned in the said letter that any reduction of the benefit receivable is not acceptable to him and that resignation letter may be treated as valid, only if the management is prepared to grant such benefit. Otherwise, it may be deemed to have been withdrawn. Exhibit A98 is a certificate issued by the employer which shows that the respondent was relieved from the service on medical ground under voluntary retirement scheme on 27.9.1999.

69.Admittedly, the respondent submitted the resignation, before attaining the retirement age and as per the medical records, it is also evident that he was unable to continue his employment. The communications between the parties clearly depict the compelling circumstances under which he was forced to submit the resignation letter. In such circumstances, the voluntary retirement cannot be made a ground to refuse the benefit, if any, the respondent is entitled to get otherwise.

CONCLUSION:

70. Summing up, I hold that the impugned order passed in favour of respondent granting benefit for 60% of permanent disablement, on the basis of Exhibit A74 and Exhibit A90, cannot be

sustained. The question of `permanent disablement', quantum of disablement, the extent of loss of earning capacity are to be considered afresh, after affording parties to adduce evidence as the Insurance Court may deem fit and proper in the light of the observations made in this judgment. The case has to be remanded to the court below for fresh consideration and disposal, in accordance with law, but it is made clear that the question whether the employment injury is 'IVDP' or not shall not be re-opened. The nature of 'employment injury' caused as a result of the accident to respondent is 'IVDP' and not “sprain” as reported by the Statutory Board. The decision on 'employment injury' to the contrary and also, the consequent report of the Board that 'permanent disablement' is 'nil' are not sustainable.

In the result,

i) The order under challenge is set aside.

ii) The case is remanded to the court below for fresh consideration and disposal, in accordance with law, in the light of the observations made in this judgment.

iii) Both sides shall be afforded an opportunity to adduce such evidence, as the court below may deem it fit and proper, in support of their contentions relating to 'permanent disablement', quantum of disablement and

extent of loss of earning capacity.

Iii) If any application is filed by respondent for reference to any medical board for assessment of 'permanent disablement', quantum of disablement etc., it shall also be considered by the court below and appropriate orders shall be passed.

iv) The parties shall appear before the court below on or before 13.6.2007 and the Insurance Court will dispose of the matter, within six months from the date of receipt of a copy of this judgment.

The appeal is allowed.

K.HEMA, JUDGE

vgs.